Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Presubscribed Interexchange Carrier Charges	)	CC Docket No. 02-53
	)	

PETITION FOR RECONSIDERATION OF SBC COMMUNICATIONS INC.

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April 14, 2005

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INTRODUCTION AND SUMMARY

Pursuant to 47 C.F.R. § 1.429, SBC Communications Inc. ("SBC") respectfully requests partial reconsideration of the Commission's February 17, 2005 Order in this docket.[1] SBC seeks reconsideration of the *Order*'s "50% rule" – *i.e.*, the rule mandating that, when customers simultaneously change their presubscribed interexchange carrier ("PIC") and their intraLATA presubscribed interexchange carrier ("LPIC"), the federally tariffed PIC-change rate must be reduced by 50%.[2]

The 50% rule is not supported by the record. The rule is predicated on the assumption that the costs per request of changing a customer's PIC *and* LPIC are identical to the costs of changing the PIC alone. But the evidence on which the *Order* relies to support that assumption says no such thing, and indeed is to the contrary. That record evidence is bolstered, moreover, by additional evidence – filed with this petition for reconsideration in accordance with the Commission's standards for submitting such evidence – that confirms that the total costs of changing a PIC and an LPIC exceed the costs of changing a stand alone PIC. In view of that evidence, the Commission should grant reconsideration and eliminate the 50% rule, leaving ILECs to recover the cost of changing the PIC under their federal tariffs and the cost of changing the LPIC under their state tariffs, as has been the practice of the FCC since 1984.

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[1] *See* Report and Order, *In the Matter of Presubscribed Interexchange Carrier Charges*, FCC 05-32, CC Docket No. 02-53 (rel. Feb. 17, 2005) ("*Order*").

[2] *See id.* ¶ 21.

In the alternative, the Commission should, at a minimum, make clear that carriers that file cost information demonstrating costs above the Commission's "safe harbor" rates are permitted to demonstrate that the cost of changing a PIC does not decline by 50% when the PIC change is coupled with an LPIC change. The opportunity to make such a showing is essential to an ILEC's ability to demonstrate the actual costs associated with PIC and LPIC changes. Without that opportunity, ILECs would be forced to redo their cost studies to accommodate a 50% rule that has no basis in reality, which is a result the Commission plainly did not intend and which is out-of-keeping with the cost-justification principles animating the *Order* in the first place.

Given the numerous system and other changes that are necessary to implement *all* the requirements of the *Order*, including possibly the 50% rule, SBC requests that the Commission act expeditiously to resolve the issues raised in this Petition well before October 17, 2005.

I. THE 50% RULE IS ARBITRARY AND CAPRICIOUS AND UNSUPPORTED BY THE EVIDENCE IN THE RECORD

The Administrative Procedures Act mandates that an agency's actions must not be "arbitrary" or "capricious."[3] An agency action must also be supported "by substantial evidence."[4] Thus, it must consider all of the "relevant factors."[5] "[A]n agency's rule normally is arbitrary and capricious if it 'entirely failed to consider an important aspect of the problem' before it."[6]

For two decades, ILECs have, as a matter of federal law, been required to charge a single, flat rate for PIC changes. For most carriers, that flat rate has been the federally-tariffed $5 safe-harbor rate established in 1984.[7] Although the Commission has permitted carriers to file cost

[3] 5 U.S.C. § 706(2)(A).

[4] *Id*. § 706(2)(E).

[5] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[6] Public Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

[7] *See* Memorandum Opinion and Order, *Investigation of Access and Divestiture Related Tariffs*, 55 Rad. Reg. 2d (P&F) 1422, App. B at 13-5 (1984).

information and thus to deviate from the safe harbor,[8] those cost-justified rates, like the $5 safe-harbor rate, have not varied based on whether the PIC change was manually or electronically processed.

The *Order* changes this long-standing practice in two significant ways. First, the *Order* for the first time requires ILECs to bifurcate their PIC change rates depending on whether the PIC change request is electronically or manually processed.[9] Second, and more importantly for purposes of this petition, ILECs are required to halve those federally tariffed rates when the customer changes both the PIC and the LPIC simultaneously.[10] It is this latter rule – the 50% rule – on which SBC seeks reconsideration.

The Commission justified the 50% rule on the theory that, when a PIC change and an LPIC change "are requested simultaneously, the costs are equal to the costs of a single change."[11] Accordingly, having required ILECs to tariff a PIC change rate that accurately reflects cost, the Commission concluded that, "to avoid double recovery," the Commission must also require ILECs to include within their tariffs rates corresponding to 50% of the manual and electronic PIC change rates, and to apply the respective "50 percent rate . . . when a customer requests a PIC change simultaneously with an LPIC change."[12]

The Commission's reasoning on this point is untenable. For one thing, it is based on an apparent misunderstanding of the cost studies submitted in this proceeding. As SBC has explained, while there are "efficiencies" associated with "performing a LPIC change at the same time as a PIC change," that "efficiency is *included in the cost results*" reflected in SBC's cost

[8] S*ee Order* ¶ 1 n.4.

[9] *See Order* ¶ 18.

[10] *See id.* ¶ 21.

[11] *Id.*

[12] *Id.*

studies.[13] The same principle holds true if two PIC changes (no LPIC change occurred) were processed on a single order. Thus, for example, the $6.04 cost reflected in the SBC Kansas cost study for a single PIC change *or* a single LPIC change already *assumes* that the PIC and the LPIC changes will be ordered simultaneously in the overwhelming majority of circumstances.[14] By then requiring SBC to reduce that rate still further (by a full 50%) – purportedly in order to account for efficiencies when a PIC change and an LPIC change are ordered simultaneously – the Commission thus necessarily double-counted (at least) those efficiencies. Far from being necessary to avoid "double recovery" of costs,[15] the 50% rule accordingly operates to prevent SBC from recovering its costs.

Equally important, the core assumption on which the Commission grounded the 50% rule – that, "when the changes [to a PIC and an LPIC] are requested simultaneously, the costs are equal to the costs of a single change,"[16] – is not supported by the record. In fact, in a statement that the *Order* does not acknowledge, Verizon explained that ILECs *do* "incur additional costs when they must process an order for both interLATA and intraLATA PIC changes," and it further noted that state commissions *already* "decide whether their charges for intraLATA PIC changes should be lower if the customer simultaneously orders an interLATA PIC change."[17] Likewise, BellSouth explained – also in comments that this portion of the *Order* does not acknowledge – that "LPIC and PIC charges recover the costs of separate and distinct activities," such as the additional "processing costs that BellSouth incurs" when performing an LPIC

[13] For example, see SBC-California, Presubscription Interexchange Carrier (PIC) Change Charge Nonrecurring Cost Study, at 2 (FCC filed Nov. 4, 2004) (emphasis added). Similar language appears in the "Overview and Methodology" section in SBC's filed cost studies for other SBC states.

[14] SBC-Kansas Study, Presubscription Interexchange Carrier (PIC/LPIC) Change Charge Nonrecurring Cost Study, "Results" (FCC filed Nov. 4, 2004) (assuming that the PIC and LPIC will be changed simultaneously in most cases, and documenting a $6.04 cost for a PIC *or* an LPIC).

[15] S*ee id.* ¶ 21.

[16] *Order* ¶ 21

[17] Verizon Comments at 8, CC Docket 02-53 (FCC filed June 14, 2002).

change.[18] For example, the "LPIC charge recovers the additional labor costs associated with a manual request and the additional processing costs in connection with a manual and a mechanical request."[19] And for both manual and mechanized requests, "BellSouth incurs additional provisioning and billing costs."[20] Thus, BellSouth concluded that "there is no overlap in the costs recovered by the PIC change charge and the LPIC change charge."[21]

To support its conclusion that, contrary to this evidence, the costs of a simultaneous PIC/LPIC change are identical to the costs of a PIC change, the *Order* relies on two filings: SBC's supplemental reply comments (at 4),[22] and Sprint's 2002 opening comments (at 13).[23] The first of these, however, states only that "IntraLATA PIC changes are subject to state jurisdiction, not federal," and that "SBC splits its costs between intraLATA and interLATA PIC changes, thereby taking into account the economies of performing both at the same time."[24] That is merely a statement of the obvious: some of the costs of a simultaneous PIC/LPIC change are recovered in federal rates, and some in state rates. And, while the statement acknowledges the "economies" of performing a PIC and an LPIC change simultaneously, it provides no support for the assertion that there are *no incremental* costs associated with performing an LPIC change in addition to a PIC change. It therefore provides no support for the 50% rule.

Nor is that rule supported by Sprint's isolated statement that, "when a customer changes both the intraLATA PIC and interLATA PIC simultaneously, the total PIC-*charge* for this transaction is the same as the *charge* imposed when a customer changes the interLATA PIC

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[18] BellSouth Comments at 7, CC Docket 02-53 (FCC filed June 24, 2002).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] SBC Reply Comments at 4, CC Docket 02-53 (FCC filed June 25, 2004) ("SBC Supplemental Reply Comments").

[23] Sprint Comments at 13, CC Docket 02-53 (FCC filed June 14, 2002) ("Sprint Comments").

[24] SBC Supplemental Reply Comments at 4.

alone."[25] Even assuming Sprint had elaborated on this point or provided any supporting evidence – which it did not – the statement by its terms is confined to the *charges* for PIC and LPIC changes. It says nothing about whether those charges accurately reflect the *costs* that ILECs incur when they perform a stand alone PIC change as compared to a simultaneous PIC/LPIC change.[26]

In short, the 50% rule is predicated on an assumption – that the costs of performing a PIC change are identical to the costs of performing a PIC change and an LPIC change simultaneously – that is contrary to the evidence in the record.[27] The Commission should grant reconsideration and eliminate the 50% rule for that reason alone, leaving ILECs to recover the costs of LPIC changes to the state jurisdictions as they have historically done.

II. ADDITIONAL EVIDENCE CONFIRMS THAT THE 50% RULE IS BASED ON INCORRECT ASSUMPTIONS

As the above discussion makes clear, the evidence already in the record establishes that, contrary to the understanding reflected in the 50% rule, other ILECs do in fact incur additional costs when they simultaneously perform a PIC change and an LPIC change. SBC's cost model is slightly different in that it already factored the efficiencies of performing a PIC and LPIC change together into its cost study rates. Thus, the 50% rule even further exacerbates the erroneous assumptions made by the Commission.

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[25] Sprint Comments at 13 (emphasis added).

[26] To the extent the Commission grounded the assumption behind the 50% rule in SBC's statement that "in California, when a customer requests a LPIC-change and PIC-change at the same time, the customer is assessed $2.49 each," SBC Supplemental Reply Comments at 4 n.11; *see Order* ¶ 21 & n.69, it fails for the same reason as does the reliance on Sprint's statement: it says nothing about the costs ILECs incur. In any case, as SBC has since explained, the statement is incorrect. It should have read: "in California, when a customer requests a LPIC-change and PIC-change at the same time, the customer is assessed $5.26 for the PIC-change and $2.49 for the LPIC-change." Ex Parte Letter from Toni Acton, SBC, to Marlene Dortch, FCC (Mar. 15, 2005). SBC regrets the error.

[27] *Cf. Sinclair Broad. Group v. FCC*, 284 F.3d 148, 162 (D.C. Cir. 2002) ("[T]he Commission cannot escape the requirements that its action not run counter to the evidence before it and that it provide a reasoned explanation for its action.") (internal quotes omitted).

SBC's filed cost studies are corroborated by the additional evidence included with this petition for reconsideration. In particular, SBC is submitting with this petition the declaration of Thomas J. Makarewicz – a Director of Cost Analysis at SBC. He explains in detail the costs associated with performing an LPIC and a PIC change simultaneously and, more importantly for purposes of this petition, explains that the per change PIC costs SBC incurs when it performs both a PIC and an LPIC change exceed 50% of the costs incurred when it performs a stand alone PIC change.

As an initial matter, there is no bar to the Commission's consideration of this evidence. Even assuming this evidence to be "new" within the meaning of the Commission's rules, the Commission is authorized to consider such evidence in connection with a petition for reconsideration where "the public interest" requires it.[28] As the Commission has stressed, that authorization "leaves [it] considerable discretion in determining which facts are relevant to [its] evaluation of petitions for reconsideration," and that discretion is properly exercised where necessary "to provide a full and accurate record."[29] The evidence SBC submits in this proceeding is offered for the sole purpose of correcting the Commission's misconception of the costs associated with performing a PIC and an LPIC change simultaneously – *i.e.*, to create "a full and accurate record" on that point – and it is accordingly properly considered here.[30]

On the merits, Mr. Makarewicz's declaration plainly confirms that, contrary to the Commission's understanding, the total costs of performing both a PIC change and an LPIC change are not the same as, and indeed, exceed the costs of a stand alone PIC change. As an

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[28] 47 C.F.R. § 1.429(b)(3).

[29] Memorandum and Order on Order on Reconsideration, *In the Matter of Interconnection Arrangements Between and Among the Domestic and International Record Carriers*, 2 FCC Rcd 2999, ¶ 16 (1987).

[30] *See id.*; *see also* Memorandum Opinion and Order, *In the Matter of Amendment of Section 73.202(b)*, 15 FCC Rcd. 8973, 8980, ¶ 12 (2000) (invoking section 1.429(b)(3) and stressing that "[f]airness and our interest in ruling on the full merits of this proceeding" warranted consideration of new evidence); Memorandum Opinion and Order, *In the Matter of Amendment of the Commission's Rules Concerning Maritime Communications*, 14 F.C.C.R. 8804, 14 FCC Rcd. 8804, ¶ 4 (1999).

initial matter, Mr. Makarewicz notes that various state[31] practices may differ: In some states, the LPIC change rate is not reduced when performed at the same time as a PIC change.[32] In others, the LPIC change rate is reduced, and in still others, the LPIC change rate is set at zero.[33] Given the wide disparity of state practices among states served by SBC, it is inappropriate for the federal PIC change rate to be set based on a nationwide, uniform percentage that does not account for local variations.

More importantly, Mr. Makarewicz confirms that SBC's filed cost studies *already* include a factor that accounts for the average number of change requests per service order. That is, a factor of 1 means that a PIC change order is unaccompanied by any other carrier change, while a factor of 2 means that each order contains two requests (typically a PIC change and LPIC change).[34] For the Consumer market segment, the factor is relatively consistent, ranging from a low of 1.90 in California to a high of 2.04 in Indiana.[35] This means that in nearly 100% of cases, a PIC change will be accompanied by another carrier change, typically an LPIC change.[36] In expectation of that fact, SBC already sets its rates accordingly, and it explicitly includes any "efficiencies" that result from performing simultaneous PIC/LPIC changes.[37] Table 2 in the Makarewicz declaration clearly shows that, contrary to this Commission's estimation, the total cost for a PIC/LPIC change combination is generally greater than the cost for a stand-alone PIC change.[38] Thus, as Mr. Makarewicz explains, a rule that automatically generates a 50%

[31] Mr. Markarewicz 's references to state practices is limited to the thirteen states in which SBC operates an ILEC.

[32] Makarewicz Decl. at 3.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 3-4.

[37] *Id.* at 4.

[38] *Id.* at 6.

reduction is not only unwarranted, it actually "double counts" the cost efficiencies and thereby "grossly" understates the appropriate PIC change rate.[39]

The Makarewicz declaration accordingly confirms that the factual predicate underlying the 50% rule – that, "when the changes [to a PIC and an LPIC] are requested simultaneously, the costs are equal to the costs of a single change,"[40] – is false. Like the evidence already in the record on this point, the declaration accordingly requires reconsideration of that rule.

III. AT A MINIMUM, THE COMMISSION MUST AUTHORIZE ILECS TO DEMONSTRATE THAT THE 50% RULE DOES NOT ACCURATELY REFLECT THEIR COSTS

For the reasons set forth above, the Commission should reconsider, and eliminate, the 50% rule, and leave ILECs to recover the actual costs of performing LPIC changes to the state jurisdictions, taking into account efficiencies that are realized when, as is typically the case, the customer submits the PIC and LPIC change simultaneously. In the event the Commission elects not to eliminate the 50% rule in its entirety, the Commission must at a minimum authorize ILECs to depart from it on a showing that it does not accurately reflect their costs.

As it stands today, the *Order* puts those ILECs that wish to rely on a showing of their actual PIC change costs in a straitjacket. Absent the 50% rule, an ILEC seeking to depart from the Commission's safe harbor rates would face a relatively straightforward (yet time-consuming) task: to document the costs associated with performing PIC changes, the ILEC would calculate those costs in accordance with the principles set out in paragraphs 11 through 15 of the *Order*. In doing so, of course, the ILEC would seek to capture any efficiencies that arise when a PIC and LPIC change are requested simultaneously, and it could reflect those efficiencies in its federal cost study, assign them to the state jurisdictions, or average them across both jurisdictions.

[39] *Id.* at 4.

[40] *Order* ¶ 21.

Thus, for example, the ILEC could provide a study that, like the SBC studies discussed above, documents the *average* cost associated with changing a PIC, reflecting that many times PIC change requests are accompanied by other change requests such as LPICs. In that circumstance, the ILEC's federally tariffed PIC change rate would capture some portion of the efficiencies associated with simultaneous ordering, as would the state LPIC change rate. Alternatively, the ILEC could document the costs associated solely with a stand alone PIC change – *i.e.*, assuming no simultaneous PIC/LPIC changes – and then seek to recover the incremental costs that come from a simultaneous PIC/LPIC change request in the states. In that circumstance, all of the efficiencies associated with simultaneous ordering would be captured in the state rate. Either way, the ILEC would be attempting simply to document its costs and recover them, consistent with the manner in which they are incurred.[41]

The 50% rule, however, distorts that task beyond recognition. As noted at the outset, the 50% rule mandates that the ILEC halve its federally-tariffed PIC change rate when the customer seeks to change the PIC and LPIC simultaneously. Because such dual requests are the norm, the ILEC must accordingly assume that, in the vast majority of circumstances, it will be charging (at the federal level) only half of its PIC change rate. To ensure cost recovery, the ILEC must accordingly determine what its total costs are when, as is typically the case, the PIC and the LPIC change are requested simultaneously. It must then *double* that cost, knowing that it will typically be halved in practice.

The 50% rule consequently becomes the tail that wags the dog. Because ILECs know that whatever is tariffed at the federal level will be cut in half in the vast majority of

[41] In this respect, the Commission should not be concerned with the specific formula by which costs are allocated to the PIC (in the federal jurisdiction) and to the LPIC (in the state jurisdiction) change. The costs for changing a PIC and an LPIC in the same transaction are by definition attributed to the same end user. Whether these costs are weighted towards the interstate side or the intrastate side is irrelevant so long as the carrier is not over-recovering its total costs. Accordingly, ILECs should have the flexibility to average costs between the PIC and LPIC change when they are performed together, or to charge a stand alone PIC or LPIC charge with a lower supplemental charge for an additional change done at the same time. Indeed, in states where the combined LPIC charge is set at zero, SBC and other carriers should be able to *raise* their federal PIC change rate when a combination PIC/LPIC change is performed.

circumstances, they will be faced with a Hobson's choice: Either be under-compensated by 50%, or else labor to create a cost study that accounts ahead-of-time for the expected 50% reduction. Both outcomes are untenable. The first is inconsistent with the notion that carriers have a right to be compensated for their legitimate costs (including a contribution to common costs). The second is inconsistent with the Commission's goal in permitting ILECs to provide cost support to justify a rate other than the safe harbor rate in the first place. That goal is to provide a mechanism to ensure that ILECs are able to recover their costs, assuming those costs "exceed the safe harbor limit."[42] To achieve that goal, ILECs must be permitted to document the costs in the manner in which they are incurred. They should not be forced to super-impose an assumption – that the costs of a PIC change and a PIC/LPIC change are identical – that is factually incorrect and serves to distort the cost-study process.

IV. CONCLUSION

The Commission should reconsider and eliminate the 50% rule. At a minimum, it should permit ILECs to file cost studies supporting PIC change charges that accurately reflect their costs and accordingly depart from the 50% rule.

Respectfully submitted,

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[42] *Order* ¶ 6.